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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-492

LLOYD CORPORATION, LTD.,
Petitioner,

v.

DONALD M. TANNER, ET AL.,
Respondents.

BRIEF FOR PETITIONER

GEORGE BLACK, JR.
ROBERT J. MILLER
BLACK, KENDALL, TREMAINE,
BOOTHE & HIGGINS
520 S.W. Sixth Avenue
Portland, Oregon 97204

JOHN H. PICKERING
TIMOTHY B. DYK
WILMER, CUTLER & PICKERING
900 17th Street, N.W.
Washington, D. C. 20006

Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	
Facts	2
Proceedings Below	6
SUMMARY OF ARGUMENT	8
ARGUMENT	
THE FIRST AMENDMENT DOES NOT REQUIRE PETITIONER TO MAKE ITS SHOPPING CENTER PREMISES AVAILABLE FOR THE DISTRIBUTION OF HANDBILLS WHICH ARE UNRELATED TO ITS BUSINESS, PARTICULARLY SINCE ADJACENT PUBLICLY-OWNED STREETS AND SIDEWALKS ARE AVAILABLE FOR HANDBILL DISTRIBUTION	12
1. Where, as Here, the Subject of Handbilling Is Unrelated to the Use to which Shopping Center Property Is Being Put, There Is No Justification for Requiring the Owner To Allow Its Property To Be Used for That Activity	17
2. The Petitioner Should Not Be Required To Open Its Lands for Handbilling Because the Public Areas Available in the Center and Elsewhere Make Such Use of the Privately-Owned Land Unnecessary	22
3. The Petitioner's Policy of Limiting Handbilling to the Public Areas in Lloyd Center Is a Proper and Constitutionally Permissible Regulation of the "Place" of Handbilling	25
CONCLUSION	27
APPENDIX	1a

TABLE OF AUTHORITIES

Cases:	Page
Adderley v. *Florida*, 385 U.S. 39 (1966)	13
Amalgamated Food Employees Union v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968)	*passim*
Breard v. *Alexandria*, 341 U.S. 622 (1951)	15
Cameron v. *Johnson*, 390 U.S. 611 (1968)	14
Cantwell v. *Connecticut*, 310 U.S. 296 (1940)	12, 25
Central Hardware Co. v. *NLRB*, No. 70-223, *cert. granted*, 40 U.S.L.W. 3314 (Jan. 10, 1972) (No. 70-223)	23
Cox v. *Louisiana I*, 379 U.S. 536 (1965)	14
Cox v. *Louisiana II*, 379 U.S. 559 (1965)	14
Cox v. *New Hampshire*, 312 U.S. 569 (1941)	25
Edwards v. *South Carolina*, 372 U.S. 229 (1963)	14
Frend v. *United States*, 100 F.2d 691 (D.C. Cir. 1938), *cert. denied*, 306 U.S. 640 (1939)	14
Hall v. *Commonwealth*, 188 Va. 72, 49 S.E.2d 369, *appeal dismissed*, 335 U.S. 875 (1948)	15
Kovacs v. *Cooper*, 336 U.S. 77 (1949)	25
Lindsey v. *Normet*, 40 U.S.L.W. 4184 (Feb. 23, 1972)	22
Marsh v. *Alabama*, 326 U.S. 501 (1946)	7, 10, 15, 17, 18, 23
Martin v. *City of Struthers*, 319 U.S. 141 (1943)	14, 15
NLRB v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956)	15, 23
Organization for a Better Austin v. *Keefe*, 402 U.S. 415 (1971)	15
Poulos v. *New Hampshire*, 345 U.S. 395 (1953)	25
Republic Aviation Corp. v. *NLRB*, 324 U.S. 793 (1945)	23
Rowan v. *United States Post Office Dept.*, 397 U.S. 728 (1970)	15
Taggart v. *Weinacker's, Inc.*, 397 U.S. 223 (1970)	26
Watchtower Bible & Tract Society v. *Metropolitan Life Insurance Co.*, 297 N.Y. 339, 79 N.E.2d 433, *cert. denied*, 335 U.S. 886 (1948)	15

Constitutional Provisions and Statutes:

	Page
Oregon Revised Statutes § 164.460	2, 15
Portland City Ordinance § 16-613	2
United States Code, Title 28, § 1254(1)	1
United States Code, Title 28, § 1343	2
United States Code, Title 42, § 1983	2
United States Constitution, Amendment I	2, 10, 14, 16, 25
United States Constitution, Amendment V	2, 15
United States Constitution, Amendment XIV	2, 15

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 446 F.2d 545. The opinion of the District Court is reported at 308 F. Supp. 128. These opinions, as well as the judgments of both courts, are reprinted in the Appendix to the Petition for Certiorari and appear at pages 2a and 6a, respectively.

JURISDICTION

This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered July 7, 1971. The Petition for a Writ of Certiorari was filed on October 5, 1971, and was granted by this Court on January 17, 1972.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this case, Amendments I, V and XIV of the United States Constitution, 28 U.S.C. § 1343, 42 U.S.C. § 1983, and the Oregon and City of Portland trespass laws, are reprinted in the appendix to this brief.

QUESTION PRESENTED

Does the First Amendment require Petitioner, as the owner of a shopping center, to open its land to all non-commercial handbilling even though the purpose of the handbilling is not related to Petitioner's use of the land or to any activity being conducted thereon, and use of Petitioner's land is not necessary to accomplish the purpose of the handbilling?

STATEMENT OF THE CASE

This case raises questions reserved by this Court in *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), concerning the right of a privately-owned shopping center to bar handbilling on its property, when the handbilling is unrelated to the shopping center's operations and publicly-owned areas are available for such distribution.

Facts:

As the District Court noted, the parties generally agreed on the facts. Pet. App. 7a.[1]

Petitioner, Lloyd Corporation, Ltd., is the owner of a shopping center located in an area known as Lloyd Cen-

[1] This and similar references are to the Appendix to the Petition for Certiorari which contains the opinions and judgments of the courts below. The pretrial order printed at pages 16-19 of the Appendix in this Court contains an extensive statement of agreed facts.

ter in Portland, Oregon. A. 16, 17.[2] The privately-owned areas of the Center contain stores, malls, covered walkways, and open and covered areas for automobile parking, but no residences. A. 17, 18.

All streets in and surrounding Lloyd Center are publicly owned and have adjacent public sidewalks. A. 18.[3] The Center is bounded by four such public streets—Broadway Street, Lloyd Boulevard, and Ninth and Sixteenth Avenues. It is crossed by Weidler, Halsey, Multnomah and Holladay Streets running east to west and by Fifteenth Avenue running north to south. At least six other streets run partly into or around the Center. A. 17. In total there are 66 linear blocks of publicly-owned sidewalks in the Center. There is also a public park. Some of the stores open directly onto the public sidewalks or onto the privately-owned mall and public sidewalks. Some open only onto the mall area. A. 18, 63-64. It is not possible to enter or leave the mall area without crossing one of the public streets, and if the individual enters by automobile, he is required to stop his vehicle at the intersection of the exit and the public street and sidewalk when leaving the mall parking area. A. 18-19.

The general location and layout of Lloyd Center and the public streets which adjoin and cross it are shown by the map and aerial photographs which are Exhibits 3, 4 and 5.[4] A. 115-17. The record also contains a number

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[2] "A. ——" references are to the printed Appendix in this Court which contains portions of the record below.

[3] These public streets had been in existence prior to the erection of Lloyd Center. In the course of construction these streets were widened, and other public streets were vacated, Petitioner conveying land of equal area to the City in exchange. A. 11-12, 86-87; Exs. 24-26, A. 193-222.

[4] Respondents' Exhibits are numbered 1 to 28, inclusive, and all were offered in evidence at A. 36-37. Petitioner's Exhibits numbered 51 to 56, inclusive, and 59 and 60, were offered in evidence at A. 76-77, 100-01.

of photographs of the exterior and interior parts of the Center.[5]

Petitioner, which has a very substantial investment in the Lloyd Center facilities, has a great interest in making it an effective shopping center. The privately-owned mall and walkways are designed and decorated to promote retail business, to please customers and to encourage prospective customers of Petitioner's tenants to come there where they may view and buy merchandise. A. 91-92, 98-99, 102. The private malls and walkways are obstructed and interspersed with gardens, flowerbeds, statuary, murals, various other works of art, benches, elevators and escalators, stairways and bridges and directories and information booths. A. 18, 64; Exs. 11 A-V, 55 A-V, A. 129-39, 230-47. Petitioner and its tenants spend approximately $350,000 each year to maintain the privately-owned common areas in the shopping center and to enhance customer motivation. A. 70.

The public sidewalks surrounding and intersecting Lloyd Center, consisting of over 10,000 linear feet, are available for handbilling and related activities, as is the public park which is located in the Center. A. 18-19; Ex. 3, A. 115. In addition, Petitioner maintains an auditorium in the Center which is available for hire by any group. A. 50-51, 102-03.

Petitioner, in accordance with the wishes of its shopping center tenants (A. 97-98; Ex. 59, A. 252), has since the inception of Lloyd Center in 1960 prohibited commercial and noncommercial handbilling in the private areas of the Center (A. 102) because Petitioner has found that it is controversial (A. 101), distracting and

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[5] *See* Exs. 11 A-V, 55 A-V, A. 129-39, A. 230-47. Exhibits 11 A, D, E, G, H, and 55 T are exterior views showing public streets. Exhibits 11 B, I, and J show the lower or basement parking level. The remainder of these photographs are interior views of Petitioner's privately-owned central mall area and walkways. Exhibits 11 L and M show generally the area where the handbilling incidents which gave rise to this case occurred.

detrimental to business and because of the littering that would be caused by discarded handbills.[6] Where individuals have sought to distribute handbills at the Center, they have been requested to do so on the publicly-owned streets and sidewalks. A. 63-64. Following this Court's *Logan Valley* decision in 1968, Petitioner revised its policy to permit handbilling in the privately-owned areas of Lloyd Center so long as that handbilling was related to Petitioner's business or that of its tenants. A. 108. However, Petitioner continued its policy of refusing to allow the distribution of all other commercial and noncommercial handbills in the non-public areas of the Center.[7]

On November 14, 1968, a number of persons, including Respondents, commenced distributing handbills to passersby at various points on the malls and walkways of the privately-owned portions of Lloyd Center. A. 16-17, 72. The leaflets urged opposition to the war in Vietnam and the Selective Service System. In no way did they concern, or in any way relate to, Petitioner's business, that of any tenant in Lloyd Center, or of any activities conducted by anyone on the Lloyd Center premises. Exs. 1 and 2, A. 111-14.

Respondents did not have permission from either Petitioner or any of the Lloyd Center tenants to distribute handbills, such permission having been denied by Petitioner. A. 17. At the time that the distribution was

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[6] A. 7, 46-47, 63, 70-71, 90-92, 97-98. Petitioner has placed signs embedded in the walkways of the private areas that state:

> "NOTICE—Areas in Lloyd Center used by the public are not public ways but are for the use of Lloyd Center tenants and the public transacting business with them. Permission to use said areas may be revoked at any time. LLOYD CORPORATION, LTD." A. 106-07.

[7] Petitioner has allowed certain other activities in the private areas, not involving handbills, because these activities are beneficial to the Center's business and often bring "a great many people to Lloyd Center who may shop before they leave." A. 51. Petitioner paid to get some such attractions. A. 51.

taking place at least two shoppers, and perhaps others, expressed annoyance at Respondents' handbilling activities.[8] The manager of Lloyd Center and security officers employed by Petitioner requested Respondents to cease distributing leaflets in the privately-owned areas of Lloyd Center and suggested that they instead distribute their leaflets in the public streets and sidewalks of the Center.[9] Respondents, and those participating with them in the handbill distribution, eventually moved to the public streets and sidewalks, or left the Center, in order to avoid the possibility of arrest for trespass. A. 17, 73-74, 81-84.

Proceedings Below:

On March 7, 1969, Respondents commenced this action against Petitioner in the United States District Court for the District of Oregon requesting a declaratory judgment and injunction forbidding Petitioner from refusing them permission to distribute noncommercial handbills in the privately-owned areas of Lloyd Center. A. 8-9.

After a trial without a jury, the District Court held for Respondents. The court found that "[i]t is true that under some circumstances, conduct accompanying the distribution of handbills could interfere with Mall business" at the Center, but that there was no such interference in this case because "[t]here was no littering or disturbance." Pet. App. 10a. While recognizing that Respondents' handbilling was in no way related to Petitioner's business or that of any Lloyd Center tenant, and that Respondents' activities interfered to some extent with customers' motivation to buy, the court held that the First Amendment required that Petitioner afford ac-

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[8] A. 48-49, 74, 100. Another shopper expressed the view that Respondents should not be required to leave. A. 75.

[9] A. 17, 72-74. These security officers are commissioned as special police officers by the City of Portland. A. 19.

cess for unrelated handbilling in the private areas of Lloyd Center, relying on this Court's decisions in *Marsh* v. *Alabama*, 326 U.S. 501 (1946), and *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc., supra.* Pet. App. 11a-13a. The court concluded that the "sole distinction between this case and *Marsh* is that this case involves a shopping center whereas *Marsh* involved a town" and that this Court in *Logan Valley* "expressly extended *Marsh* to shopping centers." Pet. App. 13a. The court recognized that "[i]t is true that the court in *Logan Valley* left open the question whether the owner could bar picketing which was not directly related to the use of the center." The court concluded, however, that "[h]ere, Plaintiffs' distribution of handbills was pure speech" and "[i]f *Logan Valley* does not go as far as I suggest, the First Amendment does." Pet. App. 14a.

The court entered a declaratory judgment and injunction broadly barring Petitioner from excluding noncommercial handbilling on its premises.[10] No reference was made to the particular handbills of Respondents in either the declaratory judgment or the injunction. Neither was there any distinction made between the public streets and areas in Lloyd Center and the privately-owned walkways where the handbilling incident occurred. Also, no

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[10] The operative portions of the judgment and injunction read as follows:

> "1. Plaintiffs have a right to distribute non-commercial handbills in a peaceful and orderly manner in the malls and walkways within Lloyd Center at times when they are open to general public access;
>
> "2. For the reason set forth in the Court Opinion dated January 15, 1970, defendant Lloyd Corporation, Ltd., its officers, agents, servants and employees, and those persons in active concert or participation with them who receive actual notice of this declaratory judgment and decree by personal service or otherwise, are enjoined from preventing or interfering with the distribution of non-commercial handbills in a peaceful and orderly manner in the malls and walkways within Lloyd Center at times when they are open to general public access . . . ."

The full text appears at Pet. App. 4a-5a.

distinction was made between handbills bearing a direct relation in their purpose to Petitioner's use of its property and those that do not.

Petitioner sought review in the United States Court of Appeals for the Ninth Circuit which, on July 7, 1971, affirmed in a brief per curiam opinion. The Court of Appeals concluded that, in the light of the District Court's finding that Lloyd Center was "the functional equivalent of a public business district," it was required to affirm because it was "powerless to hold that the critical factual determination which is here involved was clearly erroneous." Pet. App. 2a.

This Court granted certiorari on January 17, 1972.

SUMMARY OF ARGUMENT

In *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), this Court held that the owner of a private shopping center could not bar picketing and handbilling on the premises where these activities were related to the business of one of the shopping center's tenants and there was no effective means of reaching shopping center customers by conducting these activities on publicly-owned streets and sidewalks. Left open was the question of whether handbilling could be barred when it was not "directly related" to the business of a shopping center and, also, the extent to which handbilling might be regulated or controlled under other circumstances.

By contrast, this case raises the question whether a shopping center owner may prohibit handbilling where the handbilling is unrelated to the business of the center and can be effectively accomplished by utilizing public streets and sidewalks adjoining and intersecting the shopping center premises.

The District Court here concluded that Petitioner was required to open its shopping center premises to

Respondents' activities because they constituted "pure speech." However, a long line of decisions of this Court, including *Logan Valley* itself, recognizes that handbilling, like picketing, involves conduct other than speech and "can be subjected to controls that would not be constitutionally permissible in the case of pure speech." 391 U.S. at 313.

Even where public property is involved, there is no absolute right to engage in picketing and handbilling activities, and the State may prohibit such activities in certain areas, such as jail grounds, courthouses, embassies, or other areas peculiarly subject to disruption. Even where the State may not prohibit such activities, it may regulate them to ensure that they cause a minimum of disruption.

The rights of a property owner, though having their origin in state property law, are greater. While an owner of a company town may not exclude handbilling altogether, this Court has sustained the right of a home owner to bar solicitors from his private residence and the right of an owner to bar handbilling from private apartment dwellings.

A shopping center, which falls somewhere between the extremes of a company town and a private residence, is neither absolutely subject to the control of the owner nor is it absolutely open to all those wishing to engage in speech activities. While the rights of free speech and association are important, the interests of Petitioner in controlling the use of its property are neither abstract nor unimportant. If Petitioner is compelled to allow indiscriminate handbilling on its premises, it will be significantly affected. The costs in terms of litter collection alone may be substantial. Moreover, handbilling competes for the time and attention of people Petitioner and its tenants have attracted to their shopping center at substantial expense for their own business purposes, and, as the record in this case reflects, many

shoppers find handbilling to be a considerable annoyance and distraction.

Each case requires an appropriate resolution of the conflicting interests of shopping center owners and those seeking to engage in speech activities on shopping center premises. In three important respects this case is so significantly different from *Logan Valley* as to require a different result:

First, here the handbilling was totally unrelated to Petitioner's business or that of any tenant of Lloyd Center. The distinction between handbilling which is related to the business of the shopping center and that which is not is substantial and, we submit, controlling.

The application of the First Amendment to privately-owned property rests upon the premise that if the owner of property has opened it to the public, he cannot restrict the use of the property in a manner inconsistent with that invitation. Thus, in *Marsh* v. *Alabama*, 326 U.S. 501 (1946), the Court held that an owner of a company town, having opened his property to the general public, was required to afford access for general speech activities. In the case of a shopping center, a different situation prevails. The owner's invitation extends only to that portion of the public which seeks to transact business with those occupying the shopping center premises. While this invitation may be deemed to include those desiring to criticize these businesses, it quite clearly does not extend to those who wish to create a public forum for the discussion of general public issues.

Moreover, where the handbilling is unrelated to the use of the property, it cannot be argued that handbilling on the shopping center premises is necessary for effective exercise of First Amendment rights since the other public areas in the community provide a fully adequate forum to reach the general public. Under such circumstances the concern this Court expressed in *Logan*

Valley that businesses "could largely immunize themselves from . . . criticism by creating a *cordon sanitaire* of parking lots around their stores," 391 U.S. at 325, has no application. In short, the justifications advanced in *Logan Valley* for permitting picketing and handbilling which was directly related to the business of a shopping center do not exist in this case.

Second, although the unrelated nature of the handbilling is in our view dispositive of this case as a matter of law, there is another important factual difference between this case and *Logan Valley* which likewise requires a different result.

Here, unlike *Logan Valley*, there were publicly-owned areas in and around Lloyd Center where Respondents' handbilling could have been effectively conducted.

In *Logan Valley*, the nearest public areas were 350 to 500 feet away from the shopping center. If the handbilling activities had been confined in this area, those engaged in handbill distribution would have had to approach the shopping center customers while they were "moving by car from the roads onto the mall parking areas." 391 U.S. at 322. The Court found that automobiles entering or leaving the center moved "constantly at rates of speed varying from moderate to high" and that "the task of distributing handbills to persons in moving automobiles is vastly greater (and more hazardous) than it would be . . . to pass them out within the [shopping center] mall to pedestrians." *Id.* Lloyd Center, on the other hand, is adjoined and intersected by 66 linear blocks of public sidewalks. All people who enter or leave the private areas of the center must cross the public streets and sidewalks. If they are leaving the parking area by automobile, they are required to come to a complete stop at the intersection of the shopping center exit and the public street and sidewalk. Under these circumstances, we submit, there is no necessity, and hence no

First Amendment right of access, to Petitioner's privately-owned land.

Third, even in cases involving publicly-owned thoroughfares, the State does not lack power to regulate the "time, place and manner" of speech activities. *See Cantwell* v. *Connecticut*, 310 U.S. 296, 304 (1940). Thus, it seems that even a State could preclude handbilling on certain publicly-owned streets as long as other public streets and sidewalks are available for that purpose.

Whether or not this is the case, however, such restrictions are clearly permissible in the privately-owned areas of a shopping center which, like the one involved here, is adjoined and intersected by public streets and sidewalks. We submit that Petitioner's requirement that Respondents distribute their handbills on the publicly-owned areas in Lloyd Center was an entirely reasonable regulation of the "place" of handbilling.

ARGUMENT

THE FIRST AMENDMENT DOES NOT REQUIRE PETITIONER TO MAKE ITS SHOPPING CENTER PREMISES AVAILABLE FOR THE DISTRIBUTION OF HANDBILLS WHICH ARE UNRELATED TO ITS BUSINESS, PARTICULARLY SINCE ADJACENT PUBLICLY-OWNED STREETS AND SIDEWALKS ARE AVAILABLE FOR HANDBILL DISTRIBUTION.

This case presents again for this Court's determination a conflict between an owner's interest in regulating the use of its private business property and the interests of others who seek to use the property for their own purposes of speech and association. Specifically the question here is whether the owner of a private shopping center can prohibit handbilling on the shopping center's premises where the handbilling is unrelated to the business of the center and can be accomplished by utilizing

public streets and sidewalks adjoining and intersecting the shopping center premises.

The courts below held that despite the lack of relation between the purpose of the handbill messages and Petitioner's use of its land, and despite the availability of public streets, sidewalks and a public park in and around Petitioner's shopping center, Petitioner may not enforce its ban on handbilling within the private areas of its shopping center. Apparently, the courts below concluded that because Petitioner invites the public to use its private shopping center property for some purposes, it is required to open its property for all noncommercial handbilling even though the handbilling has no relation to those purposes and in fact interferes with Petitioner's utilization of that property for business.

Initially we point out that the analyses of the District Court and the Court of Appeals were seriously deficient. The decisions below apparently rest upon the erroneous premise that Respondents' activities were entitled to protection because they were "pure speech." Pet. App. 14a. As this Court said in *Logan Valley*, "[h]andbilling, like picketing, involves conduct other than speech, namely, the physical presence of the person distributing leaflets on [Petitioner's] . . . property." 391 U.S. at 315-16. Accordingly, handbilling, like picketing, "can be subjected to controls that would not be constitutionally permissible in the case of pure speech." *Id.* at 313. Moreover, the decisions of this Court make clear that the nature of the property involved, as well as the activities themselves, has a direct bearing on the extent to which these activities can be controlled and even prohibited.

Thus, even where public property is involved, this Court pointed out in *Adderley* v. *Florida*, 385 U.S. 39, 48 (1966), that persons who want to propagandize their protests or views do not "have a constitutional right to do so whenever and however and wherever they please"

and held that such persons could appropriately be excluded from jail grounds, noting that:

> "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. . . . The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose." *Id.* at 47-48.

Where publicly-owned streets are involved the degree of permissible regulation is perhaps more limited. Despite this Court's statement in *Cox* v. *Louisiana I*, 379 U.S. 536, 555 n.13 (1965), that it remains an open question, we assume that any attempt by the State to reserve all publicly-owned streets, sidewalks and parks exclusively for transportation and recreational activities may be unconstitutional under the First Amendment. *Cf. Edwards* v. *South Carolina*, 372 U.S. 229 (1963).

At the same time, the fact of public ownership does not mean that streets must always be made available for the exercise of speech and assembly. The State can properly exclude speech activities at or near courthouses, embassies, or other areas peculiarly subject to disruption. *See Cox* v. *Louisiana II*, 379 U.S. 559, 563-64 (1965); *Cameron* v. *Johnson*, 390 U.S. 611, 616 (1968); *Frend* v. *United States*, 100 F.2d 691 (D.C. Cir. 1938), *cert. denied*, 306 U.S. 640 (1939).

This case, however, does not involve publicly-owned land, and because the rights of private business and private property must be taken into account, the rights of regulation afforded the owner are greater.

Petitioner's right to control its shopping center land has its source in state property law. Traditionally (and under Oregon law), this right is protected by state common law and statutory trespass laws. *See Martin* v. *City of Struthers*, 319 U.S. 141, 147 (1943), where the Ore-

gon trespass statute involved in this case (Ore. Rev. Stat. § 164.460, printed in the appendix to this brief) was cited in support of the statement: "Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off." The rights of private property owners, thus created by state law, are guaranteed by the Fifth and Fourteenth Amendments. *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). Accordingly, as this Court stated in *Logan Valley*, "the rights traditionally associated with ownership of private property" may well permit the owner of private property "to limit the use of that property by members of the public in a manner that would not be permissible were the property owned by a municipality." 391 U.S. at 319.

In the area of handbilling and solicitation, this Court has held that handbillers may not be entirely barred from a privately-owned town, *Marsh* v. *Alabama*, *supra*, or from all private residences regardless of the desire of the owners, *Martin* v. *City of Struthers*, *supra*. *Cf. Organization for a Better Austin* v. *Keefe*, 402 U.S. 415 (1971). On the other hand, it has held that a State may constitutionally bar solicitors from private residences if they are not invited, *Breard* v. *Alexandria*, 341 U.S. 622 (1951), and handbillers from private apartment dwellings where no invitation has been extended, *Hall* v. *Commonwealth*, 188 Va. 72, 49 S.E.2d 369, *appeal dismissed*, 335 U.S. 875 (1948).[11] As this Court said in *Breard* v. *Alexandria*, 341 U.S. at 642:

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[11] The decision in *Hall* v. *Commonwealth* was approved in *Breard* v. *Alexandria*, 341 U.S. at 643-44, and in *Rowan* v. *United States Post Office Dept.*, 397 U.S. 728, 737 (1970). *See also Watchtower Bible & Tract Society* v. *Metropolitan Life Insurance Co.*, 297 N.Y. 339, 79 N.E.2d 433, *cert. denied*, 335 U.S. 886 (1948).

Similarly, although *Martin* v. *City of Struthers* struck down an absolute prohibition on door-to-door handbilling, as we have previously noted, it cited with approval the Oregon trespass statute involved in this case and went on to state: "A city can punish those who call at a home in defiance of the previously expressed will of the occupant." 319 U.S. at 148.

> "Freedom of speech or press does not mean that one can talk or distribute where, when and how one chooses. Rights other than those of the advocates are involved. By adjustment of rights, we can have both full liberty of expression and an orderly life."

A shopping center falls somewhere between the extremes of a company town and a private residence. It is not as restricted as a private residence, since it is generally open to those members of the public who desire to come and shop upon the premises. On the other hand, it is not the equivalent of a town since it has no residences, or other attributes of a municipality.

Recognizing that shopping centers stand somewhere between municipalities and private residences, this Court in *Logan Valley* struck a balance which, we suggest, went as far as is appropriate to serve the interests both of the private owner and of those who desire to engage in speech and association upon the premises. In holding that the First Amendment required the shopping center owner to allow the use of its property for union picketing and handbilling, the Court pointed out that entry into the Logan Valley Mall was by vehicle only and that to require the picketers to remain on public property 350 to 500 feet away from the Weis Market would either render their message "indecipherable" or require them ineffectively to handbill and picket "along heavily travelled roads along which traffic moves constantly at rates of speed varying from moderate to high." 391 U.S. at 322. At the same time, the Court emphasized that the speech activities were directed specifically at patrons of the Weis Market located within the shopping center, and expressly reserved the question of unrelated handbilling, stating:

> "The picketing carried on by petitioners was directed specifically at patrons of the Weis Market located within the shopping center and the message sought to be conveyed to the public concerned the

manner in which that particular market was operated. We are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put." *Id.* at 320 n.9.

There were three factors that were specifically discussed by the Court in *Logan Valley* as limitations on its holding. As will be discussed below, Petitioner submits that all three of them apply here, and that each of them independently requires the striking of a different balance and a different result from *Logan Valley*.

1. Where, As Here, the Subject of Handbilling Is Unrelated to the Use to which Shopping Center Property Is Being Put, There Is No Justification for Requiring the Owner To Allow Its Property To Be Used for That Activity.

Under the terms of the District Court's injunction, Petitioner is prevented from excluding from the mall and walkways in Lloyd Center any noncommercial handbilling—whether, as Mr. Justice White foresaw in his *Logan Valley* dissent, it is "for religious purposes, political campaigning, protests against government policies," 391 U.S. at 339, or any other noncommercial purpose. As we have noted, *Logan Valley* itself expressly declined to go so far —a fact acknowledged by the District Court below. Pet. App. 14a.

The distinction between handbilling which is related to the business of a shopping center and that which is not related is substantial and, we submit, controlling.

The related-unrelated distinction finds support in the central rationale of *Marsh* v. *Alabama* itself. That decision rests upon a theory that an owner may not open private property to the general public and at the same time

restrict its use in a manner inconsistent with that invitation. In *Marsh*, this Court stated that:

> "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." 326 U.S. at 506.

In *Marsh*, the scope of the invitation was quite broad since the general public was invited for virtually every general purpose related to life in the town. Accordingly, the Court held that the owner could not exclude general religious handbilling.

Where a shopping center is involved, however, the owner's invitation to the public and the consequent circumscribing of his property rights are much more limited. The public has been invited to shop while the center is open—an invitation clearly limited in terms of time and purpose. Surely no one would contend, for example, that Petitioner must allow an assembly or parade on its property at a time when it is closed for business merely because it is open at other times. Likewise, we submit, by opening its property for shopping purposes Petitioner in no way subjected itself to a duty to provide a public forum for discussion of every public issue.

In *Logan Valley*, Mr. Justice Douglas noted in his concurring opinion that shopping center owners have not dedicated their property wholly to a public use. Rather, they "hold out the mall as 'public' for purposes of attracting customers and facilitating delivery of merchandise." 391 U.S. at 326. Similarly, the Court's opinion limited its holding by stating:

> "All we decide here is that . . . the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and *for a purpose gen-*

erally consonant with the use to which the property is actually put." *Id.* at 319-20. (Italics added.)

Where the handbilling is unrelated to the shopping center's business and the purpose of the speech accordingly is not consonant with the scope of the public invitation issued, Petitioner submits that there is no justification for circumscribing its rights.[12]

Apart from the matter of the scope of the invitation, there is a second important reason for distinguishing between related and unrelated speech. Where speech is directly related to the use of the property in question, the audience to whom the communication is directed, like the Weis Market customers in *Logan Valley*, may be so localized that, as a practical matter, speech to be effective must be allowed on the private property itself. This need for special treatment of related speech was the stated reason for the *Logan Valley* decision. This Court cited examples of "workers seeking to challenge substandard working conditions, customers protesting shoddy or over-

[12] In this case, the scope of Petitioner's invitation to its shopping center was limited. In the words of the District Court, Petitioner opened its "land to the general public for business purposes" (Pet. App. 14a)—*i.e.*, the same as the shopping center owner did in *Logan Valley*. As noted above, signs were embedded in the sidewalks of Lloyd Center stating that "Areas in Lloyd Center used by the public are not public ways but are for the use of Lloyd Center tenants and the public transacting business with them." A. 106-07. The scope of this invitation cannot be viewed as having been substantially broadened by reason of the fact that Petitioner occasionally permitted political candidates and certain stationary solicitors for charitable causes to engage in activities on its premises. Those activities promoted Petitioner's business purpose of attracting customers to its shopping center, and whatever the impact of these activities may be upon Petitioner's right to exclude those wishing to engage in political speechmaking or stationary charitable solicitations, they do not suggest that Petitioner has opened its premises to handbilling activities having nothing to do with the business of its shopping center. Indeed, as the record reflects, Petitioner has always excluded both commercial and noncommercial handbilling from its premises (A. 102), except to the extent required by *Logan Valley* (A. 108).

priced merchandise, and minority groups seeking nondiscriminatory hiring policies," 391 U.S. at 324, as reasons for its decision that pickets and handbillers conveying such related messages could not be required to stay on public lands removed from the source of the controversy. If the result were otherwise, this Court noted it might be possible for businesses to immunize themselves from criticism, a result at odds with the "goal of free expression and communication that is the heart of the First Amendment." *Id.* at 325.

A completely different situation prevails where, as here, handbilling activities are totally unrelated to the use of the private property involved. In these circumstances, this Court's concern that shopping center businesses "could largely immunize themselves from . . . criticism [of their practices] by creating a *cordon sanitaire* of parking lots around their stores," *id.*, has no application. In this case, Respondents were not seeking to criticize Petitioner or any of its tenants. Respondents' handbills advocated resistance to the draft and advertised a meeting to be held in another part of Portland. *See* Exs. 1 and 2, A. 36-37, 111-14. To deny Respondents the opportunity to present their antidraft views on Petitioner's property in Lloyd Center produces none of the consequences which caused the result in *Logan Valley*. The Lloyd Center property of Petitioner will still be open for criticism of the business carried on there. And, even if there were no publicly owned areas in Lloyd Center available for Respondents' unrelated speech activities (which, of course, there are as discussed in the next part of this brief), the other public areas in the Portland community provide a fully adequate forum to reach the general public with messages having nothing to do with the activities of Petitioner and its tenants.

The interests of a shopping center owner in prohibiting handbilling are significant. Petitioner has a significant claim to "protection of the normal business operation of

the property" against Respondents' unrelated handbills, and more than "naked title" is in issue here. *Cf. Logan Valley*, 391 U.S. at 324. Handbilling may result in substantial business loss. The costs in terms of litter collection alone may be substantial. Petitioner and its tenants have, at great expense, designed and maintained the private areas in the Center to make it attractive, comfortable and convenient for shoppers. Handbilling competes for the time and attention of people Petitioner and its tenants have attracted to Lloyd Center at substantial expense for their own business purposes. The tenants, whose rent is Petitioner's sole source of income, have consistently objected to handbilling. A. 97-98; Ex. 59, A. 252. The uncontradicted evidence in this case, acknowledged by the District Court (Pet. App. 10a-11a), is that handbilling is controversial and distracting and that it interferes with customer motivation to buy. This customer motivation—and the goodwill of tenants which it generates—is critical to Petitioner's business.

The adverse impact on the business of Petitioner and its tenants is heightened by the breadth and indefinite nature of the injunction issued in this case. For the future, Petitioner is broadly enjoined, not just from interfering with Respondents' handbilling but with anyone's noncommercial handbilling, regardless of content. No matter how controversial, offensive, distracting, or extensive, Petitioner must permit all noncommercial handbilling, so long as it is distributed "in a peaceful and orderly manner."

In summary, the burden and inconvenience imposed by allowing private property to be used for criticism of business conducted thereon may be justified as necessary to inform the public, as consistent with the invitation opening the property to the public for business purposes, and as a reasonable incident and part of the cost of the business being conducted. But there is no such justification for imposing that burden and inconvenience on pri-

vate property owners when the message has no relation to the business being conducted there, and can be communicated to the public elsewhere. A private property owner should not be required, against its own interests, to bear the burden and expense involved in providing a forum for general noncommercial communication having nothing to do with the use being made of its property. Only recently this Court, in another context, stated:

> "Nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom." *Lindsey* v. *Normet*, 40 U.S.L.W. 4184, 4190 (Feb. 23, 1972).

But the injunction in this case is essentially inconsistent with that constitutional protection, and it should not be permitted to stand. The justifications which may be advanced for constitutionally requiring shopping center owners to allow the use of their land for handbilling, when it is directly related to the business being conducted on their premises, simply do not exist when the handbills have nothing to do with that business. This factor alone is, we submit, dispositive of this case as a matter of law. However, there are two additional distinctions between this case and *Logan Valley* which likewise require reversal of the decision below, and it is to those additional distinctions that we now turn.

2. The Petitioner Should Not Be Required To Open Its Lands for Handbilling Because the Public Areas Available in the Center and Elsewhere Make Such Use of the Privately-Owned Land Unnecessary.

A second important distinction between this case and *Logan Valley* is that here, unlike the situation in *Logan Valley*, there are public streets and sidewalks available in and around the shopping center for effective distribution of Respondents' handbills. The relevance of this has been noted in *Logan Valley* and other cases dealing with the extent to which private property must be made available for speech and association activities.

For example, in *NLRB* v. *Babcock & Wilcox Co.*, *supra*, this Court held that an employer could exclude union handbillers from its private business property because those handbillers could, with reasonable effectiveness, accomplish their purpose by communicating their message elsewhere in the community, and it was not necessary for them to use the private land. In reaching that result, the Court pointed out that organizational rights "are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." *Id.* at 112.[13]

In this case, as noted above, all public areas in the entire metropolitan area of Portland, as well as the public areas in and around Petitioner's shopping center, were available for distribution of the Respondents' unrelated handbill message. This case is therefore unlike *Marsh* v. *Alabama*, *supra*, where the entire community was privately owned. Likewise, this case is distinguishable from *Logan Valley* since the extensive public streets, sidewalks and the public park available for handbilling in Lloyd Center make it unnecessary for Respondents to use Petitioner's land.

In *Logan Valley*, the nearest public lands were berms 350 to 500 feet away from the Weis Market, and Weis customers entered the premises by vehicle. The Court found that if the picketers and handbillers were banished to those lands their signs would be "virtually indecipherable" because they would have to be read at that distance "or while the prospective reader is moving by car from

[13] As to the use of company property for organizational purposes in other circumstances, however, compare *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793 (1945). A facet of the use of an employer's property for organizational purposes under the National Labor Relations Act is, of course, before this Court in *Central Hardware Co.* v. *NLRB*, *cert. granted*, 40 U.S.L.W. 3314 (Jan. 10, 1972) (No. 70-223).

the roads onto the mall parking areas via the entrance ways cut through the berms." 391 U.S. at 322.

This consideration is simply not present here. Lloyd Center is bordered and crossed by publicly owned sidewalks that abut the buildings. In all, there are 66 linear blocks of public sidewalks with bus-stops and pedestrian crosswalks located thereon.

All people who enter or leave the private areas on Petitioner's land must cross the public streets and sidewalks. They may do so on foot or in automobiles. When leaving the privately-owned area parking lots, automobiles are required by law to come to a complete stop at the intersection of the exit and the public street and sidewalk. Handbills could have been distributed, not only to pedestrians, but also to occupants of automobiles from the public streets and sidewalks with considerable ease and without significant hazards to those engaged in the distribution.[14] Respondents did, in fact, move to the public areas to complete distribution of their handbills. In *Logan Valley*, as noted above, the situation was significantly different. Not only was all entry by vehicle, but this Court found that the automobiles entering and leaving the mall moved "constantly at rates of speed varying from moderate to high" and that "the task of distributing handbills to persons in *moving* automobiles is vastly greater (and more hazardous) than it would be . . . to pass them

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[14] While the District Court found that Respondents could not as effectively achieve their purposes by distributing their handbills in the public areas of Lloyd Center, the District Court based this conclusion on its finding that "[m]any customers do not use the public sidewalks and streets except when entering the Mall by automobile." Pet. App. 11a. The District Court did not refer to the agreed facts that automobiles are required by law to stop at the public streets when leaving Petitioner's premises (A. 18), and apparently did not consider whether the Respondents could effectively distribute handbills to automobile occupants as they stopped at the public streets on departing Lloyd Center.

out within the mall to pedestrians." 391 U.S. at 322. (Italics added.)

Everyone shopping at Lloyd Center was available to receive Respondents' handbills. Although it might have been easier for Respondents to distribute their handbills inside Petitioner's premises instead of in the public areas, Respondents have not and cannot demonstrate any necessity for doing so. In these circumstances, there is no reason for depriving Petitioner of its substantial interests in preserving its carefully designed and managed private areas for business use.

3. The Petitioner's Policy of Limiting Handbilling to the Public Areas in Lloyd Center Is a Proper and Constitutionally Permissible Regulation of the "Place" of Handbilling.

As we have discussed, even in cases involving publicly-owned thoroughfares, it is established that the State does not lack power to regulate the place and manner of handbilling. As this Court said in *Cantwell* v. *Connecticut*, 310 U.S. 296, 304 (1940), "a State may by general and non-discriminatory legislation regulate the time, *the places*, and the manner of soliciting upon its streets, and of holding meetings thereon." (Italics added.) *See also id.* at 306-07; *Cox* v. *New Hampshire*, 312 U.S. 569 (1941); *Poulos* v. *New Hampshire*, 345 U.S. 395 (1953); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949).

Thus, it would appear that even a State regulation limiting handbilling to certain publicly-owned streets would be permissible under the First Amendment, so long as other public streets and sidewalks were available for that purpose. Whether or not this is the case, however, such restrictions are clearly permissible in the privately-owned areas of a shopping center.

In its *Logan Valley* decision this Court recognized that private property owners, and at their behest the State, are not "without power to make reasonable regu-

lations governing the exercise of First Amendment rights" on shopping center property. 391 U.S. at 320. The Court said, "[c]ertainly their rights to make such regulations are at the very least co-extensive with the powers possessed by States and municipalities, and recognized in many opinions of this Court . . . ." *Id.* The scope of regulation and its relation to the particular circumstances involved was further recognized in *Taggart* v. *Weinacker's, Inc.*, 397 U.S. 223 (1970), which dismissed as improvidently granted a writ of certiorari to review an injunction against picketing on a store owner's premises. In so doing, this Court said that, even if under *Logan Valley*, "the union had a First Amendment right to picket on the property involved in this case, a matter that we need not decide, in final analysis we would come down to whether, in light of the physical circumstances of this narrow sidewalk at the store entrance," regulation of the picketing would be permissible. *Id.* at 225.

Under the circumstances of this case—which as we have shown are significantly different from those involved in *Logan Valley*—the requirement that handbilling be carried on in the public areas of Petitioner's shopping center can be fairly characterized as permissible "regulation rather than . . . suppression." *Cf. Logan Valley*, 391 U.S. at 321. We therefore submit that, given the public areas in and around Lloyd Center and elsewhere in the City of Portland, it was entirely reasonable for Petitioner to regulate the "place" of handbilling at Lloyd Center by confining this handbilling to the public areas in Lloyd Center, which include sidewalks, crosswalks, bus-stops, a public park, and other public areas traditionally used for this purpose. On this ground alone, we suggest, this case is distinguishable from *Logan Valley*, and the decision below should be reversed.

But we need not rest on this ground alone. We have pointed out that three factors are present in this case

which were specifically discussed as limiting the holding in *Logan Valley*—the lack of any relation between Respondents' handbills and the business being conducted by Petitioner and its tenants, the lack of any necessity for Respondents to use Petitioner's property to reach the public at Lloyd Center with their anti-draft views, and the reasonableness of restricting Respondents to the public areas in Lloyd Center as a permissible regulation of the place of handbilling. We submit that each of these factors alone compels a different result from that reached in *Logan Valley*, and, when they are considered in combination, there can be no doubt that reversal is required.

CONCLUSION

For the reasons stated, the judgment below should be reversed.

Respectfully submitted,

GEORGE BLACK, JR.
ROBERT J. MILLER
BLACK, KENDALL, TREMAINE,
BOOTHE & HIGGINS
520 S.W. Sixth Avenue
Portland, Oregon 97204

JOHN H. PICKERING
TIMOTHY B. DYK
WILMER, CUTLER & PICKERING
900 17th Street, N.W.
Washington, D. C. 20006

Counsel for Petitioner

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